



BOULT ■ CUMMINGS®
CONNERS ■ BERRY PLC

Henry Walker
(615) 252-2363
Fax (615) 252-6363
Email hwalker@boultcummings.com

December 22, 2004

Jean Stone, Hearing Officer
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Re: *In Re: Petition of King's Chapel Capacity*
Docket No. 04-00335

Dear Hearing Officer Stone:

Attached is the Response of Tennessee Wastewater Systems, Inc. to the Motion to Reconsider or in the Alternative, for Intermediate Relief, filed by King's Chapel Capacity, LLC.

Please be advised that, as described more fully herein, on December 20, 2004, Williamson County Chancellor Donald P. Harris denied the Motion to Dismiss filed by King's Chapel.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:



Henry Walker

HW/djc

cc: Richard Militana
Charles Welch

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**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE: Petition of King's Chapel Capacity,)
LLC for Certificate of Convenience and)
Necessity to Serve an Area in Williamson,)
County, Tennessee Known as Ashby Community)

Docket No. 04-00335

**RESPONSE OF TENNESSEE WASTEWATER TO MOTION TO RECONSIDER
OR, IN THE ALTERNATIVE, MOTION FOR INTERMEDIATE RELIEF**

Tennessee Wastewater Systems, Inc. ("TWS") submits the following response to the motion to reconsider or, in the alternative, for intermediate relief filed by King's Chapel Capacity, LLC ("King's Chapel").

BACKGROUND

On December 17, 2004, the Hearing Officer entered an order granting the Motion of TWS to hold these proceedings in abeyance. The Hearing Officer correctly recognized that the Authority "cannot determine the respective status of the parties until the [Williamson County] Chancery Court determines who owns the sewer system" which both companies now claim and until The Tennessee Department of Environment and Conservation ("TDEC") "determines who will ultimately possess a state operating permit ["SOP"] to provide service to the subdivision." Order, at 6. Therefore, the Hearing Officer ordered that the application of King's Chapel be stayed pending (1) a decision by TDEC regarding the state operating permit issue and (2) a ruling by Chancellor Donald P. Harris determining which entity owns the newly constructed system (Count III of the Complaint filed in Williamson County by TWS).

On Monday December 20, 2004, Chancellor Harris orally denied the motion of King's Chapel to dismiss Count III. (A written order will be issued shortly.) The Chancellor explained

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to the attorney for King's Chapel that there were too many disputed factual issues to grant a motion to dismiss and that these issues should be addressed in motions for summary judgment. The Chancellor also commented during oral argument that, since Williamson County requires that the entity which operates a sewer system must also own the system, it seemed logical that the developers of the new subdivision must have known that, upon completion of the system, it would be both operated and owned by TWS. Therefore, it appears that the Court will address the merits of TWS's complaint, including the question of who owns the system. Once that occurs and once TDEC has ruled on the SOP issue, the TRA can then decide the applicability of T. C. A. §65-4-203(a) and address the merits of the application of King's Chapel.

ARGUMENT

The Motion filed by King's Chapel does not address any of the Hearing Officer's reasons for holding this matter in abeyance. The Motion is founded entirely on the claim that any delay resulting from this contract dispute between TWS and the developers will cause financial harm, not to King's Chapel, but to the development company. The Motion implies that, if only the TRA would proceed to act on the application of King's Chapel, or give some other utility company the right to complete¹ and operate the new sewer system, the developers can begin selling lots and building houses.²

¹ Because of the absence of a factual record, there may be some confusion as to whether the sewer system at issue is, as TWS has explained, "substantially complete." It is the understanding of TWS that the entire "treatment" system, which TWS is obligated by contract to build, is completed other than the construction of a holding pond (The holding pond is a local requirement but is not expected to ever be used.) The "collection" system ie, the collection pipes and pump stations, which is the responsibility of the developer under the parties' contract, has not been built nor, TWS believes, even started.

² King's Chapel states in the Motion to Reconsider that "there are forty-eight lot owners who cannot close on their property, much less begin any construction until sewer service is established for the subdivision." There are no facts yet developed in this record to support that statement. Moreover, it is the understanding of TWS that, since the development has not yet received final approval by Williamson County, there are no "lots" yet laid out, nor any "lot owners" in existence.

The Motion to Reconsider begs the question of why the Hearing Officer granted the request for abeyance in the first place. The problem, of course, is that the TRA can not act on the application without determining (1) who owns the system and (2) which carrier will hold an SOP from TDEC. The TRA has no statutory jurisdiction to resolve either of these critical issues, both of which are now the subject of proceedings in other forums.³ As the Hearing Officer concluded, it is not possible for the TRA to carry out its statutory responsibilities until those other matters are resolved. The Motion to Reconsider does not dispute that conclusion.

ALTERNATIVE RELIEF

In the alternative, King's Chapel asks that the TRA authorize another utility to complete and operate the system, pending a final decision by the TRA on the King's Chapel application.

TWS opposes that request on both legal and equitable grounds. While it is regrettable that the developers' project has been delayed, the delay is due entirely to their own refusal to abide by their contract with TWS. TWS is obviously competent to build and operate the system and stands ready to begin providing service as soon as the developers fulfill their contractual obligations. But, like any other utility, TWS is not obligated to provide service for free or for less than the agreed-upon amount. TWS should not be forced to surrender its statutory rights simply because the developers state that they are in financial trouble.

³ See Reply Brief of TWS filed December 16, 2004, at 4-5 concerning the TRA's lack of jurisdiction to rule on the ownership issue

On December 16, 2004, TWS filed a discretionary Reply Brief in support of the request to hold these proceedings in abeyance. In light of the nearly contemporaneous issuance of the Hearing Officer's Order agreeing to suspend the proceedings, the Hearing Officer denied the motion of TWS to file the Reply Brief. The Reply Brief, however, remains in the TRA's paper and electronic files. In light of the Motion to Reconsider, TWS would like to direct the Hearing Officer's attention to some of the legal arguments set forth in the Reply Brief but, to avoid wasteful duplication, has not re-filed the Reply Brief and attachments.

Legally, TWS retains the exclusive right to provide service to that subdivision. TWS cannot be deprived of that right except by the TRA, acting pursuant to T. C. A. §65-4-203(a).⁴ As previously discussed, the Hearing Officer has recognized that the Authority cannot meaningfully determine how to apply that statute to this case until the Chancery Court determines who owns the system. If, as TWS contends, TWS owns this system, then TWS clearly has facilities in place which are adequate to provide the requested service and Section 203(a) prohibits the TRA from authorizing anyone else, on either a permanent or temporary basis, to serve that subdivision. Thus, until the ownership issue is resolved, the TRA cannot lawfully grant the alternative relief sought by King's Chapel.⁵

Second, the request for a third party operator raises practical problems. TWS uses a unique wastewater treatment process. To the knowledge of TWS, no other public utility operator in Tennessee is familiar with the TWS treatment process or is trained to operate it. Therefore, the request by King's Chapel that a third party be allowed to complete and operate the TWS system on an interim basis would require the TRA to conduct a hearing to determine the managerial and technical ability of the third party to operate the system and the third party's willingness to indemnify TWS for any damage to the system. Thus, even if the TRA could circumvent the requirements of T.C.A. §65-4-203(a) and give another carrier a temporary license to operate the TWS system, the practical problems of issuing a certificate to another operator

⁴ See Reply Brief of Tennessee Wastewater Systems, Inc, filed December 16, 2004 at 2 for a discussion of the case law and statutes giving TWS an exclusive franchise within its service area.

⁵ Even if the TRA issued some kind of "interim" certificate to another utility, a remedy not authorized by any TRA statute, it seems unlikely that Williamson County would allow the developers to begin selling lots. As TWS has previously noted (Motion to Hold Proceedings in Abeyance, at footnote 5), Williamson County rules require that the same entity both own and operate a wastewater system. Therefore, it appears from the letter written by the attorney for the Williamson County Planning Commission that she will not recommend that the Commission approve the final plat for this development until the ownership issue is resolved by the Court. (A copy of her letter is attached to the Motion to Hold Proceedings in Abeyance.)

would inevitably involve the agency in a morass of tangential, operational issues. All of these problems can be avoided and further delay eliminated if the developers of the new subdivision would just do what they agreed to do.

CONCLUSION

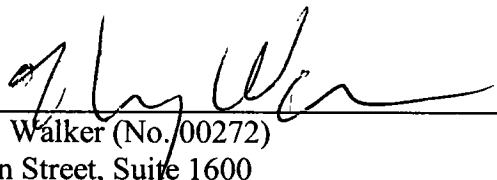
The contractual disputes pending before Chancellor Harris and the proceedings at TDEC are not matters within the TRA's jurisdiction. Any financial harm to the developers arising out of the delay caused by these proceedings, both of which are the direct result of the developers' own decisions, is neither the fault of the TRA nor the responsibility of this agency to fix. The agency should not, and legally cannot, predetermine the issues of system ownership and the award of an SOP but must await until TDEC and the Chancery Court have ruled.

The Hearing Officer's decision was correct and, in light of all the circumstances, the only logical conclusion that she could have reached.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____


Henry M. Walker (No. 00272)
414 Union Street, Suite 1600
P.O. Box 198062
Nashville, Tennessee 37219
(615) 252-2363

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being forwarded via U.S. mail, postage prepaid, to:

Richard Militana
Militana & Militana
5845 Old Highway 96
Franklin, TN 37064

Charles B. Welch, Jr.
Farris, Mathews, Branan, Bobango, Hellen & Dunlap, PLC
Historic Castner-Knott Building
618 Church Street, Suite 300
Nashville, TN 37219

on this the 22nd day of December, 2004.



Henry M. Walker